

D.P.U. 91-DS-51

Adjudicatory hearing in the matter of a possible violation of General Laws, Chapter 82, Section 40, by Toll Brothers, Inc.

APPEARANCES: Paul E. Webber, Project Manager
Toll Brothers, Inc.
25 South Street
Hopkinton, Massachusetts 01757
FOR: TOLL BROTHERS, INC.
Respondent

Gail Soares, Dig-Safe Investigator
Division of Pipeline Engineering and Safety
Department of Public Utilities
Boston, Massachusetts 02202
FOR: THE DIVISION OF PIPELINE
ENGINEERING AND SAFETY

I. INTRODUCTION

On September 6, 1991, the Division of Pipeline Engineering and Safety ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to Toll Brothers, Inc. ("Respondent"). The NOPV stated that the Division had reason to believe that the Respondent performed excavations on June 27, 1991 at 4 Mill River Circle, Franklin, Massachusetts, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to tender proper notification, causing damage to an underground service line by Bay State Gas Company ("Bay State Gas" or "Company"). The NOPV also stated that the Respondent had the right to either appear before a Department hearing officer in an informal conference on September 25, 1991, or send a written reply to the Department by that date.

On September 23, 1991, the Respondent sent a letter to the Division. In a return letter dated December 2, 1991, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law and informed the Respondent of its right to request an adjudicatory hearing. On December 11, 1991, the Respondent requested an adjudicatory hearing pursuant to 220 C.M.R. § 99.07(3). After due notice, an adjudicatory hearing was held on January 26, 1993 pursuant to the Department's procedures for enforcement under 220 C.M.R. § 99.00 et seq.

At the hearing, Gail Soares, a Dig-Safe investigator for the Division, appeared on behalf of the Division. Brant Bollivar, a supervisor for the Company, testified in behalf of the Division. Paul E. Webber, project manager for the Respondent, testified for the Respondent. All exhibits offered were moved into evidence by the Department.

II. SUMMARY OF FACTS

A. The Division

The Division alleges that the Respondent failed to tender proper notice by failing to contact Dig Safe System, Incorporated ("Dig-Safe")¹ before excavating at 4 Mill River Circle, Franklin, on June 27, 1991, resulting in damage to an underground service line (Tr. at 4, 16-17; Exh. D-3).

In support of this allegation, the Division stated that the Respondent had ample time to notify Dig-Safe of the proposed excavation, regardless of its emergency nature (Tr. at 8, 24). The Division also stated that in emergency situations, excavators must still provide proper notification to all utility companies with underground facilities in the area as soon as is reasonably possible (id. at 24). The Division further stated that the Respondent was aware of the need for excavation at 6:00 p.m. on June 26, 1991, the evening before the excavation was performed (id.). In addition, Mr. Bollivar stated that the Company could have marked the area in question in under four hours if it had been notified during the night before the excavation, or, in under two hours if the Company had been notified during the morning before the excavation (id. at 9). Finally, the Division stated that if the Respondent had contacted the Company, the Respondent would have provided proper notification, and the area would have been properly marked (id. at 24).

B. The Respondent

¹ Dig-Safe is a non-profit organization that exists for the express purpose of gathering information on proposed excavations from excavators, and disseminating that information to utility companies so that they can properly mark their underground facilities before excavation begins. See G.L. c. 82, § 40.

Mr. Webber testified that the Respondent was contacted by a home-owner at 6:00 p.m. on June 26, 1991, and informed that several homes had no electricity (id. at 4). Mr. Webber also testified that this information prompted the Respondent to investigate the electricity outage, and determine that an emergency excavation had to be performed the following morning (id. at 17, 23). He further testified that the Respondent hired a private excavator to excavate and expose a faulty electric line for Massachusetts Electric Company ("Massachusetts Electric"), and contended that the excavator knew the location of that electric line (id. at 16-18, 25). In addition, Mr. Webber testified the Massachusetts Electric personnel were contacted on the evening of June 26, 1991, and were on the excavation site when excavation was performed by the Respondent (id. at 16-17). He contended that it was not necessary to notify Bay State of the excavation, as the gas service was located three feet away from the electric line, and the Respondent's trench only came within one and a half to two feet of the gas line (id. at 13, 15, 18, 20-21).² Mr. Webber also contended that Dig-Safe should not be contacted unless an excavation site contains multiple underground facilities (id. at 24).

Mr. Webber testified that the Respondent did not expose the Company's gas line (id. at 13, 19). However, he testified that during the Respondent's excavation, two boulders resting between the electric line and the gas line had been moved, and probably caused the break in the gas line (id. at 15, 18, 20). He contended that the reason damage occurred to the gas line was due to the improper back-fill that surrounded the Company's gas line (id. at 15, 18). He testified

² Mr. Webber testified that calling Dig-Safe to request markings had not been considered when the Respondent was notifying Massachusetts Electric because the Respondent believed that the waiting period was 72-hours, which it considered too long to wait in this situation (Tr. at 20, 23-24).

that the back-fill surrounding the gas line did not contain sand and other "soft" substances as it should have, to protect the facility from pressure, such as the weight of two boulders (id. at 12, 15-16).

III. STANDARD OF REVIEW

G.L. c. 82, § 40 states in pertinent part:

No person shall... contract for, or make an excavation...in any public way, any public utility right of way or easement, or any privately owned land under which any public utility company, municipal utility department, natural gas pipeline company, or cable television company maintains underground facilities, including pipes, mains, wires or conduits, unless at least seventy-two hours, exclusive of Saturdays, Sundays and legal holidays, but not more than thirty days, before the proposed excavation is to be made such person has given an initial notice in writing of the proposed excavation to such natural gas pipeline companies, public utility companies, cable television companies and municipal utility departments as supply gas, electricity, telephone or cable television service in or to the city or town where such excavation is to be made. Such notice shall set forth the name of the street or the route number of said way and a reasonably accurate description of the location in said way or on private property the excavation is to be made...If any such notice cannot be given as aforesaid because of an emergency, it shall be given as soon as may be practicable.

The Department has held that a contractor's notice must adequately name the street of the proposed excavation, and give a reasonably accurate description of the location where the excavation is to be made. Weston Geophysical Corporation, D.P.U. 89-DS-115 (1993); Boston Gas Company, D.P.U. 88-DS-3 (1990). The statute assigns to the company the responsibility to mark the location of all company facilities in the area of the proposed excavation.

In Silversmith, D.P.U. 89-DS-111 (1993), an excavator's description of an area to be excavated was considered "reasonable" by the Department where the excavation occurred within the boundaries of, and on the side of the street closest to, the address requested to be marked by

the Respondent. The Department also held that excavating in an area over 100 feet from the area requested by an excavator to be marked was not "reasonably accurate" as the Dig-Safe Law mandates. R.J. Cincotta Co., Inc., D.P.U 89-DS-76 (1990).

In addition, the Department has found that a utility company is not in violation of the Dig-Safe Law when it fails to mark facilities that are not located within the area originally requested by an excavator. See Colonial Gas Company, D.P.U. 86-DS-23 (1987). In that case, an excavator requested markings for 25 Bradford Road and then excavated across the street at 24 Bradford Road, causing damage to an unmarked company facility. Because the excavation took place across the street from the address requested to be marked by the excavator, the company was not found in violation of the Dig-Safe Law for failing to mark those facilities.

Any party excavating in an emergency situation must provide proper notice at the earliest possible moment. Pepperell Water Co., D.P.U. 86-DS-70 (1987).³ In addition, the Department has found that despite any contentions that an excavator "knew" the location of underground facilities, proper notice was still required. Sciaba Construction Company, D.P.U. 86-DS-163

³ 220 CMR 99.03 states:

(1) If, because of an emergency, an excavator is unable to give notice to the company sooner than 72 hours...as required by M.G.L. c. 82, § 40, before beginning excavation, the excavator may commence excavating after having taken all reasonable steps, consistent with the urgency of the emergency need to excavate, to notify each company providing gas, electric, telephone or cable television services in or to the city or town where the excavation is to be performed.

(2) Notwithstanding the provisions of 220 CMR 99:03 (1), an excavator must notify said company or companies forthwith upon determining that an emergency exists requiring excavation sooner than the expiration of the 72-hour notice period.

(1990).

IV. ANALYSIS AND FINDINGS

The issue to be decided in this case is whether the excavator failed to tender proper notification before excavating.

In addressing the issue of whether the Respondent tendered proper notice before excavating, the Division alleged that the Respondent had ample time to provide proper emergency notification to Dig-Safe. The Division's witness supported this allegation when he stated that the Company could have properly marked the excavation site within the time period between the Respondent's first knowledge of the proposed excavation and the commencing of that excavation.

The Respondent's contention is that it "knew" the location of the electric line that was to be excavated and notified the electric company that operated that line, and therefore, contacting Dig-Safe was not necessary. However, excavators are required to notify all Companies that have utilities in the area of excavation, or contact Dig-Safe. See Sciaba Construction Company, supra. In cases of emergency, the Dig-Safe Law states that all utility companies with underground facilities in the area of the proposed excavation must be noticed by excavators as soon as those excavators learn that excavation will be necessary before the expiration of the 72-hour notice period, or as soon as practicable. See also 220 CMR 99.03(2).

Although the Respondent testified that its excavation did not expose the Company's underground gas line and that the gas line was not part of its excavation, it admitted that the Company's gas line was located between one and a half and two feet from the edge of its excavation. Given the close proximity of the gas line to the excavation, we find that a gas line

was located in the area of the Respondent's proposed excavation. Accordingly, the Department finds that the Respondent failed to tender proper notification when excavating on June 27, 1991 at 4 Mill River Circle, Franklin, Massachusetts, and thus, violated the Dig-Safe Law.

V. ORDER

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That Toll Brothers, Inc. violated the Dig-Safe Law during excavation on June 27, 1991 at 4 Mill River Circle, Franklin; and it is

ORDERED: That Toll Brothers, Incorporated, being a violator of the Dig-Safe Law, shall pay a civil penalty of \$200 to the Commonwealth of Massachusetts by submitting a check or money order in that amount to the Secretary of the Department of Public Utilities, payable to the Commonwealth of Massachusetts, within 30 days of the date of this order.

By Order of the Department,

MISC. TEXT

Underground facilities can be subject to grade changes or other factors which cause their position to change. The Department has held that grade changes and other factors must be considered by all parties when initially marking and locating underground facilities. See Amorello & Sons, D.P.U. 89-DS-61 (1990). Accordingly, when utility companies locate their underground facilities, they use metal detectors and maps, in tandem. Without exact knowledge of the location of facilities, excavators can unwittingly damage underground facilities that were thought to be located elsewhere. The instant and above situations are situations that the Dig-Safe Law was created to avoid. Therefore, because Bay State's facilities were within three feet of the electric line excavated by the Respondent, it was necessary that Bay State be properly notified of the Respondent's excavation.